Lembaga Kumpulan Wang Simpanan Pekerja v Carimonde Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12A-403 OF 2010
VARGHESE GEORGE JC
31 JANUARY 2011

Civil Procedure — Pleadings — Failure to plead a defence — Defence of limitation not pleaded — Plaintiff having sufficient notice of defence of limitation — Whether defect in pleading could have been cured if matter proceeded further — Whether defendants could have amended statement of defence to include limitation — Delay by plaintiff in raising objection regarding pleading of limitation — Whether defendants' failure to plead defence of limitation fatal

Limitation — Public authorities — Whether action time barred — Claim by Employee Provident Fund Board against company and directors for unremitted contributions — Whether claim time barred under Limitation Act 1953 — Whether non obstante clause in s 46(1) and s 65(1) of the Employees Provident Fund Act 1991 ousted provisions of Limitation Act 1953

Statutory Interpretation — Construction of statutes — Rules of construction — Construction of non obstante clause — Whether non obstante clause automatically displaces or overrides all other legal provisions — Whether extent of intended exclusion to be worked out from examining objective or scope of provision containing non obstante clause

The plaintiff commenced an action at the sessions court to recover from the defendants unremitted contributions for the employees of the first defendant for the period July 1999 to October 2000. The second and third defendants were the directors of the first defendant. The defendants had filed a statement of defence to the said claim. The plaintiff then proceeded to file an application pursuant to O 26A of the Subordinate Courts Rules 1980 for summary judgment against the defendants. However before that application was dealt with, the plaintiff filed applications to amend the statement of claim and also to amend the O 26A application ('the applications'). The defendants filed two separate affidavits contesting the said applications wherein the defendants raised the issue that the plaintiff's action was statute-barred. There was not affidavit in response filed for the plaintiff. The defendants thus made an oral application to strike out the summons and statement of claim. The applications made by the plaintiff were dismissed and the defendants oral

application to strike out the summons and statement of claim was allowed on the grounds that the plaintiff, regardless of ss 46(1) and ss 65(1) of the Employees Provident Fund Act 1991 ('EPF Act'), was not exempted from the statutory force of the Limitation Act 1953 ('the Act'). Hence this appeal. The plaintiff contended that the terms '… notwithstanding anything to the contrary in this Act or in any other written law …' in s 46(1) and 'Notwithstanding the provisions of any other written law …' in s 65(1) of the EPF Act excluded or ousted as a whole the provisions of the Act in respect of all proceedings brought by the plaintiff to recover arrears of contribution. The plaintiff also submitted that the issue of limitation was not pleaded by the defendants. The defendants' position was that ss 46(1) and s 65(1) of the EPF Act are in the nature of non obstante clause which do not exclude fully the whole of all other written law but only those provisions in other legislation or such part of other law which are in conflict with the subject matter or intention or the scope behind the provision bearing the non-obstante clause.

Held, dismissing the appeal with no order as to costs:

(1) Where the non obstante clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude per se all other legislation or provisions in force in other legislations. It does not automatically displace or override all other legal provisions. The extent of such intended exclusion must be worked out from a further examination of the objective or scope or purpose behind the provisions where the non obstante clause is adopted. Only where there arises a clash or a conflict between the specific statutory objective behind that provision and such other law on the same subject, would the other law be held to be excluded from being operative (see paras 26 & 27).

(2) In law the non obstante terms in s 46(1) and/or s 65(1) of the EPF Act, generally worded as they are without specific reference to any particular provision or legislation, do not go to exclude or oust the provisions of the Act as a whole (see para 26). *Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor* [2009] 1 LNS 1719 (not followed); *Lembaga Kumpulan Simpanan Wang Pekerja v Manfred Smisek & 5 Ors* [2009] 1 LNS 1719 (not followed).

(3) What was being excluded by the non obstante clause in s 46(1) were only such specific provisions in the EPF Act itself or in other legislation that were not in accord with the statutory objective or scope underlying s 46(1) namely to impose liability, inter alia, on directors of company to pay for the arrears of employees' contributions owed by a company. The statutory intent of s 65(1) is to enable the board to have the locus standi to bring proceedings to recover unremitted contributions as a civil debt apart from the criminal proceedings envisaged in the EPF Act. What

could therefore be overridden or excluded by the use of the non obstante clause are only provisions in any other written law that conflict or clash with this statutory objective or scope of s 65(1) (see paras 31 & 35).

(4) The plaintiff had sufficient notice of the defence of limitation. Had the plaintiff been successful in amending their statement of claim, the defendants would have had a corresponding right to amend their statement of defence. Nothing would have restricted the defendants from then amending their pleadings to include a specific defence that the action was statute-barred. The so called defect in the pleading could and would have been cured in any case if the matter proceeded further. Furthermore, such an objection should have been taken by the plaintiff earlier in the proceedings and not just at this stage if the plaintiff was serious about the same. The plaintiff and the learned sessions judge acted or proceeded to deal with the defendants' oral application to strike out the action (notwithstanding no express defence of limitation being pleaded), fully conscious of and recognising the defendants' right always to amend their statement of defence to include the defence of 'limitation' if it came to that. Thus, the defendants' failure to plead the defence of 'limitation' in the statement of defence was not fatal to the defendants' case that the action was statute-barred (see paras 44-46). *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663 referred, and *Haji Hussain bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227; [1983] CLJ (Rep) 165 referred.

[Bahasa Malaysia summary

Plaintif telah memulakan tindakan di mahkamah sesyen untuk mendapat balik daripada defendan-defendan caruman-caruman yang tidak diremitkan untuk pekerja defendan pertama untuk tempoh Julai 1999 hingga Oktober 2000. Defendan-defendan kedua dan ketiga adalah pengarah-pengarah defendan pertama. Defendan-defendan telah memfailkan penyataan pembelaan terhadap tuntutan tersebut. Plaintif kemudian telah terus memfailkan permohonan menurut A 26A Kaedah-Kaedah Mahkamah Rendah 1980 untuk penghakiman terus terhadap defendan-defendan. Walau bagaimanapun sebelum permohonan itu dibicarakan, plaintif telah memfailkan permohonan untuk meminda penyataan tuntutan dan juga untuk memonda permohonan A 26A ('permohonan tersebut'). Defendan-defendan telah memfailkan dua afidavit berasingan mempertikaikan permohonan-permohonan tersebut di mana defendan-defendan telah menimbulkan isu bahawa tindakan plaintif telah luput masa. Tiada afidavit balasan telah difailkan bagi pihak plaintif. Oleh itu defendan-defendan telah membuat permohonan lisan untuk membatalkan saman dan penyataan tuntutan. Permohonan-permohonan yang dibuat oleh plaintif telah ditolak dan permohonan lisan defendan-defendan untuk membatalkan saman dan penyataan tuntutan telah dibenarkan atas alasan bahawa plaintif, tanpa mengira ss 46(1) dan ss 65(1)

Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP'), tidak dikecualikan daripada kuasa statutori Akta Had Masa 1953 ('Akta tersebut'). Justeru itu rayuan ini. Plaintif menegaskan bahawa terma '… notwithstanding anything to the contrary in this Act or in any other written law …' dalam s 46(1) dan 'Notwithstanding the provisions of any other written law …' dalam s 65(1) Akta KWSP mengecualikan atau menyingkirkan secara keseluruhan peruntukan Akta tersebut berkaitan semua prosiding yang dimulakan oleh plaintif untuk mendapat balik tunggakan caruman. Plaintif juga berhujah bahawa isu had masa tidak diplid oleh defendan-defendan. Pendapat defendan-defendan adalah bahawa ss 46(1) dan 65(2) Akta KWSP bersifat fasal non obstante yang tidak mengecualikan secara menyeluruh semua undang-undang lain tetapi hanya peruntukan dalam perundangan lain atau sebahagian undang-undang lain yang bercanggah dengan perkara atau niat atai skop di sebalik peruntukan yang mempunyai fasal non obstate itu.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Di mana fasal non obstante merujuk secara amnya tanpa menyatakan peruntukan atau statut spesifik untuk ditolak, adalah tidak dibenarkan untuk mengecualikan per se semua perundangan atau peruntukan lain yang berkuat kuasa dalam perundangan lain. Ia tidak secara automatik mengganti atau menolak semua peruntukan perundangan lain. Tahap pengecualian yang diniatkan perlu dilaksanakan berdasarkan pemeriksaan objekif atau skop atau tujuan di sebalik peruntukan di mana fasal non obstante digunapakai. Hanya jika timbul percanggahan atau konflik antara objektif spesifik statutori di sebalik peruntukan tersebut dengan undang-undang lain berkaitan subjek sama, maka undang-undang lain itu akan diputuskan untuk dikecualikan daripada berkuat kuasa (lihat perenggan 26 & 27).

(2) Dari segi undang-undang istilah non obstante dalam s 46(1) dan/atau s 65(1) Akta KWSP, yang disusun secara amnya untuk tidak memberi rujukan spesifik kepada mana-mana peruntukan atau perundangan tertentu, tidak mengecualikan atau menolak peruntukan Akta tersebut secara keseluruhan (lihat perenggan 26); *Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor* [2009] 1 LNS 1719 (tidak diikut); *Lembaga Kumpulan Simpanan Wang Pekerja v Manfred Smisek & 5 Ors* [2009] 1 LNS 1719 (tidak diikut).

(3) Apa yang dikecualikan oleh fasal non obstante dalam s 46(1) hanya peruntukan spesifik tertentu dalam Akta KWSP atau dalam perundangan lain yang tidak selari dengan objektif atau skop s 46(1) iaitu mengenakan liabiliti, antara lain, ke atas pengarah-pengarah syarikat untuk membayar tunggakan caruman pekerja yang patut dibayar oleh syarikat. Niat statutori s 65(1) adalah untuk membolehkan Lembaga mempunyai locus standi memulakan prosiding untuk mendapat balik

caruman yang tidak diremitkan sebagai hutang sivil selain daripada prosiding jenayah yang dinyatakan dalam Akta KWSP. Apa yang boleh ditolak atau dikecualikan oleh penggunaan fasal non obstante hanyalah peruntukan dalam mana-mana undang-undang bertulis lain yang bercanggah atau bertentangan dengan objektif atau skop s 65(1) (lihat perenggan 31 & 35).

(4) Plaintif mempunyai notis pembelaan had masa yang memadai. Jika plaintif berjaya meminda penyataan tuntutan,defendan-defendan akan mendapat hak balasan untuk meminda penyataan pembelaan mereka. Tiada apa-apa yang menghalang defendan-defendan daripada meminda pliding mereka untuk memasukkan pembelaan spesifik bahawa tindakan telah luput masa. Kecacatan yang dikatakan dalam pliding itu mungkin boleh dan akan dipulihkan dalam apa keadaan jika perkara itu seteruskan. Tambahan pula, bantahan sedemikian patut diambil oleh plaintif lebih awal dalam prosiding dan bukan di peringkat ini jika plaintif serius tentangnya. Plaintif dan hakim mahkamah sesyen telah bertindak atau meneruskan permohonan lisan defendan-defendan untuk membatalkan tindakan (meskipun tiada pembelaan had masa diplidkan), dengan penuh sedar dan menyedari hak defendan-defendan untuk meminda penyataan pembelaan bagi memasukkan pembelaan 'limitation' jika ia perlu. Oleh itu, kegagalan defendan-defendan untuk memplid pembelaan tentang 'limitation' dalam penyataan pembelaan tidak memudaratkan kes defendan-defendan sehingga tindakan itu luput had masa (lihat perenggan 44-46); *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663 dan *Haji Hussain bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227; [1983] CLJ (Rep) 165.]

Notes

For a case on failure to plead a defence, see 2(3)*Mallal's Digest* (4th Ed, 2010 Reissue) para 6027.

For a case on whether action time barred, see *Mallal's Digest* (4th Ed, 2010 Reissue) para 2392.

For cases on rules of construction, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1874-1891.

Cases referred to

AG Varadarajulu & Anor v State of Tamil Nadu & Ors AIR 1998 SC 1388, SC (distd)

Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia [1981] 2 MLJ 259, FC (refd)

Chai Siew Yin v Leong Wee Shin [2004] 1 CLJ 752, CA (refd)

Haji Hussain bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227; [1983] CLJ (Rep) 165, FC (refd)

Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor [2002] 6 MLJ 186, HC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor (unreported), HC (not folld)
Lembaga Kumpulan Simpanan Wang Pekerja v Manfred Smisek & 5 Ors [2009] 1 LNS 1719, HC (not folld)
Lembaga Kumpulan Wang Simpanan Pekerja v Shaharudin Omar & Ors [2008] 8 CLJ 684, HC (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Suasa Kristal (M) Bhd & Ors [2009] 8 CLJ 236, HC (not folld)
Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 MLJ 586; [2009] 6 CLJ 586, CA (refd)
Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret David Wilson [2010] 2 MLJ 713; [2010] 5 CLJ 899, FC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)
Union of India v I C Lala 1973 2 SCC 72, SC (refd)

Legislation referred to

Employees Provident Fund Act 1991 ss 25, 46, 46(1), 65(1)
Limitation Act 1953 ss 3, 4
National Service Act 1952 s 11P(d)
Pengurusan Danaharta Nasional Berhad Act 1998
Rules of the High Court 1980 O 18 r 19
Subordinate Courts Rules 1982 O 26A

Norhadi bin Harun (Rusmin Ida & Taryna) for the appellant.
HK Neoh (BC Teh & Yeoh) for the respondent.

Varghese George JC:

[1] This was an appeal by the appellant/plaintiff (plaintiff) against the learned session judge's decision of 12 May 2010 striking out the summons and statement of claim on the grounds that the plaintiff's action was statute-barred. No 'Alasan Penghakiman' was available but it appears that the sessions judge was persuaded to do so on an oral application of the respondents/defendants (defendants), on the grounds that the plaintiff, regardless of ss 46(1) and 65(1) of the Employees Provident Fund Act 1991 ('EPF Act'), was not exempted from the statutory force of the Limitation Act 1953 ('LAct').

BACKGROUND

[2] The plaintiff commenced an action at the session court on 21 July 2006

to recover jointly and severally from the defendants what is alleged to be unremitted contributions for the employees of the first defendant for the period July 1999 to October 2000 (arrears), together with certain 'dividends' and 'interest' accruing upon the said sum in arrears. The second and third defendants were the directors of the first defendant.

[3] The defendants had on 27 October 2006 filed a statement of defence to the said claim.

[4] In May 2007 the plaintiff proceeded to file an application pursuant to O 26A of the SCR 1980 for summary judgment to be entered against all the defendants in the action. However before that application was dealt with, the plaintiff filed applications to amend the statement of claim and also to amend the O 26A application via *kandungan* 8 (21 May 2007) and *kandungan* 10 (31 May 2007), respectively.

[5] In response to the plaintiff's applications, the third defendant, on behalf of the defendants, filed two separate *afidavit balasan* (both affirmed on 17 July 2007) contesting the said applications of the plaintiff to amend the statement of claim and the O 26A application.

[6] It is noteworthy that in the two *afidavit balasan*, the defendants did raise the issue that the plaintiff's action was statute-barred. We find identical averments in the said affidavits in the following terms:

> … selanjutnya menegaskan bahawa tuntutan Plaintif sama sekali adalah terhalang oleh had masa memandangkan tuntutan Plaintif adalah untuk tunggakan caruman daripada tempoh Julai 1999 sehingga Oktober 2000 di mana Plaintif sepatutnya telah memfailkan tuntutan Plaintif tersebut sebelum Julai 2005 akan tetapi Plaintif hanya menfailkan Saman dan Pernyataan Tuntutan Plaintif pada 12.07.2006 iaitu di luarmasa yang diperuntukkan di bawah Undang-Undang ….

[7] From the appeal record, there does not appear to be any affidavit in response filed for the plaintiff, further in the matter.

[8] The defendants' oral application to strike out the summons and statement of claim adverted to above, was apparently made during the hearing of *kandungan* 8 and *kandungan* 10.

[9] In the event both *kandungan* 8 and *kandungan* 10 of the plaintiff were dismissed on the 23 April 2010.

On 12 May 2010 the learned judge proceeded to allow the oral application of

the defendants to strike out the summons and statement of claim and it is against that decision to strike out that this appeal is being brought by the plaintiff.

[10] By the time this appeal came up for disposal the first defendant had been wound up and the second defendant had been adjudicated a bankrupt. The appeal was only being contested by the third defendant.

THE PLAINTIFF'S CONTENTION IN SUMMARY

[11] The plaintiff's principal contention was that the terms '... notwithstanding anything to the contrary in this act or in any other written law …' in s 46(1), and 'Notwithstanding the provisions of any other written law …' in the opening lines of s 65(1) of the EPF Act excluded or ousted as a whole the provisions of the LAct in respect of all proceedings brought by the plaintiff to recover arrears of contribution. In other words, actions to recover such arrears against errant employers and their directors as empowered under the EPF Act (a unique statute for the benefit of employees as was argued) were not caught by the statute-bar of six years under the LAct for any such recovery action to be commenced.

[12] Basically the plaintiff cited three decisions of the courts in support of the argument above. It was contended that in *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186, where there arose a conflict between two written law, it had been held that the provisions of a specific and subsequent legislation, there the Pengurusan Danaharta Nasional Bhd Act 1998, prevailed over the operation of the general provisions of the LAct.

[13] Counsel for the plaintiff also referred to two recent decisions where a similar issue as to the effect of the highlighted terms in ss 46(1) and 65(1) as above, were considered. Hadariah JC in *Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor* (unreported) had considered those provisions and also specifically the effect of the amendment made to s 65(1) (by Act A914) by the insertion of the words/clause 'Notwithstanding the provisions of any other written law …' and had held that the intention of the legislature was to exclude applicability of other written law including the LAct in so far as proceedings brought under the EPF Act was concerned.

[14] Similarly, Zabariah JC (as she then was) in *Lembaga Kumpulan Simpanan Wang Pekerja v Manfred Smisek & 5 Ors* [2009] 1 LNS 1719 had concluded that by those qualifying words in ss 46(1) and 65(1) of the EPF Act, the provisions of the LAct had been effectively excluded in the case of proceedings brought pursuant to the EPF Act.

[15] The plaintiff in reply-submissions also raised the issue that 'limitation' as a defence *had not been expressly pleaded* by the defendants as required under s 4 of the LAct. This therefore, it was further argued, precluded the defendants from pursuing with this line of defence to the plaintiff's action, in any event.

THE DEFENDANTS' CONTENTION IN SUMMARY

[16] The defendants' position was that the monies being sought to be recovered from the defendants were in respect of alleged unremitted contributions in 1999 and the action filed in 2006 was clearly statute-barred pursuant to the provisions of the LAct. The applicability of the LAct to such recovery actions by the plaintiff, it was contended, was not excluded at all by s 46(1) and s 65(1) of the EPF Act as presently worded.

The words '... notwithstanding anything to the contrary in this Act or in any other written law …' in s 46(1) and ' Notwithstanding the provisions of any other written law …' in the opening lines of s 65(1) of the EPF Act, it was pointed out by counsel for the third defendant, was in the nature of what is recognised in law as 'non obstante' clause (see *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia* [1981] 2 MLJ 259 at p 262 where the Federal Court observed: '... GO 44 … opens with the significant non obstante clause 'Notwithstanding these General Orders …' making it quite separate and distinct from the preceding three parts of the GO dealing with conduct, disciplinary procedure and general provisions pertaining to disciplinary punishments. GO 44 goes therefore beyond and is additional to what precedes it').

[17] The effect of such a non obstante clause, it was argued, was not to exclude fully the whole of all other written law but only those provisions in other legislation or such part of other law which were in conflict, or which contradicted or clashed when the subject matter or intention or the scope behind the provision bearing the non-obstante which was to be established upon a further examination. Here, it was contended that the object behind ss 46(1) and 65(1) of the EPF Act did not involve or deal with the subject of 'limitation period' as was stipulated in the LAct, at all.

[18] It was also argued for the defendants that should it have been the intention of the legislature to exclude the limitation period from applying to all recovery actions under the EPF Act, then the provisions should have mirrored the more specific words found in s 11P(d) of the National Service Act 1952 which was in the following terms:

> *Nothing in any other written law which prescribes for a period of limitation* respecting the time for the hearing and determining of offences *shall apply* in the case of any proceedings so instituted as aforesaid.

[19] It was further contended for the defendants that for an exclusion of the LAct to be valid in law, *s 3 of the LAct itself* made it a requirement that the other written law in question should prescribe some other or alternative period of limitation. This, it was highlighted by counsel, was glaringly absent in the case of the EPF Act in any event.

[20] In response to the plaintiff's contention that for 'limitation' to be pursued as a defence, it ought to be in the first place specifically pleaded, the defendants' position was that this was not an absolute must as the highest courts in the country have allowed the defence of limitation to be still pursued, notwithstanding that it was not expressly pleaded, particularly, where the other party had notice that this was a defence that would be taken in the action.

ISSUES BEFORE THE COURT

[21] In my assessment there were therefore two basic issues before the court for determination in this appeal. They were:

(a) Whether the 'non obstante' clauses in s 46(1) and s 65(1) of the EPF Act had the effect of completely ousting the applicability of LAct, with the result that any recovery action commenced by the plaintiff against an errant employer (incorporated company) and personally against the directors of the entity, as was the case here, was not subject to any limitation period at all; and

(b) Whether the defendants in this case were absolutely precluded from raising the defence of 'limitation' since no such defence had been expressly pleaded in the statement of defence of the defendants that had been filed in the action.

THE APPROACH WHEN DEALING WITH A NON OBSTANTE CLAUSE

[22] In the recent decision of the Federal Court in *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret David Wilson* [2010] 2 MLJ 713; [2010] 5 CLJ 899, Heliliah Mohamed Yusoff FCJ noted that: 'The term 'notwithstanding' means generally 'not to stand against' or in the way' or overriding' and went on to cite with approval a quote from the judgment of the Indian Supreme Court in *Union of India v I C Lala* 1973 2 SCC 72 at p 77 which was as follows:

> The words notwithstanding anything contained in the Code of Criminal Procedure found at the beginning of s 5A(1) of the Prevention of Corruption Act 1947 (now s 17 Prevention of Corruption Act 1988) merely carve out a limited exemption from the provision of the Code of Criminal Procedure in so far as they limit the class of persons who are competent to investigate offences mentioned in the section and to

arrest without warrant. *It does not mean that the whole of the Code of Criminal Procedure... is made inapplicable*. (Emphasis added.)

[23] The approach to be taken in interpreting a provision containing an non obstante clause was more pointedly stated in yet another judgment of the Indian Supreme Court, that is in the case of *AG Varadarajulu & Anor v State of Tamil Nadu & Ors* AIR 1998 SC 1388 where at p 1392 it declared:

> It is well settled that in dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, *the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section*. … the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from the provisions of the same statute or other statute but for that reason alone we must *determine the scope of the provision strictly. When the section containing the said clause does not refer to any particular provision which it intends to override but refers to the statute generally, it is not permissible to hold that it excludes the whole Act and stands alone all by itself. A search has, therefore, to be made with a view of determining which provision answers the description and which does not*. (Emphasis added.)

In that case, the issue of interpretation centered on whether one section excluded the application of another section in the *same statute* but to me the principle to be drawn was the same, namely, that where the non obstante clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude per se all other legislation or provisions in force in other legislations. It does not automatically displace or override all other legal provisions.

[24] The extent of such intended exclusion must however be worked out from a further examination of the objective or scope or purpose behind the provisions where the non obstante clause is adopted. Only where then there arise a clash or a conflict between the specific statutory objective behind that provision and such other law on the same subject, would the other law be held to be excluded from being operative.

[25] I therefore agree with submission of counsel for the third defendant that the court should in the instant case, firstly, embark upon a further examination to determine the intention or objective behind s 46(1) and s 65(1) of the EPF Act. This was to ascertain whether the statutory intent or scope behind those two sections were in conflict with the limitation provisions of the LAct.

[26] It is my conclusion therefore that in law the non obstante terms in s 46(1) and/or s 65(1) of the EPF Act, generally worded as they are without specific reference to any particular provision or legislation, does not go to

exclude or oust the provisions of the LAct as a whole. Following from that there must then be a further examination undertaken by the court as to what was the specific legislative objective or the 'mischief intended to be cured by those sections in the EPF Act and whether in applying the law, a conflict or clash arose *between* that statutory objective and the law as found in those sections of the EPF Act *and* the other legislation or provisions on the same area of law.

[27] Only if there was any such a conflict or clash between those provisions on the same subject, would the area in law covered by those sections in the EPF Act prevail to the exclusion of any conflicting other legal provision on that subject.

[28] The attention of my sisters Hadariah JC and Zabariah JC in *Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor* and *Lembaga Kumpulan Simpanan Wang Pekerja v Manfred Smisek & 5 Ors* respectively, appear not to have been drawn to the serious implication that surround the use of a non obstante clause in legislations and also to the proper approach to be adopted in interpreting the effect of such a clause as is found in s 46(1) and s 65(1) of the EPF Act. With respect therefore, I have to disagree with the conclusions reached in those two decisions where it was held in a broad sweep, so to speak, that recovery actions by the plaintiff under the EPF Act were not subject to or restricted by such limitation period as spelt out in the LAct.

SECTION 46(1)

[29] Section 46(1) of the EPF Act reads as follows:

> 46 Joint and several liability of directors, etc
>
> (1) Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company during such period in which contributions were liable to be paid, or the partners of such firms, including any persons who were directors of such firms during such period in which contribution were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contribution due and payable to the Fund.

The language of s 46(1), counsel argued, clearly demonstrated that where, amongst others, an incorporated company with limited liability was the defaulting party the provision was intended 'to lift the corporate veil' and to impose personal liability on directors of the company in default to settle the debts of the company.

Such a conclusion, it was contended further, was fortified by the marginal notes to that s 46(1) in the following terms: 'Joint and several liability of directors etc' It is settled law now that assistance in interpretation of statutory provisions may also be drawn from marginal notes to that section in the legislation itself: (*Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (FC); *Chai Siew Yin v Leong Wee Shin* [2004] 1 CLJ 752 (CA).)

[30] I accept those submissions of counsel for the third defendant and hold that it is clearly discernable from a reading of s 46 of the EPF Act in its entirety that the legislative intent or purpose behind s 46(1) was definitely to provide an additional right or recourse, jointly and severally, against directors or responsible individuals or officers of a defaulting company, partnership or association when, as the law ordinarily stood, there was no such right where the debtor was an incorporated company or the law was ambiguous in the case of partnerships and associations. (See also the decisions in *Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 MLJ 586; [2009] 6 CLJ 586 (CA) and *Lembaga Kumpulan Wang Simpanan Pekerja v Suasa Kristal (M) Bhd & Ors* [2009] 8 CLJ 236). In effect therefore, an unequivocal statutory cause of action against directors or responsible individuals and officers of errant entities was being created by this provision, namely s 46(1) of the EPF Act.

[31] Accordingly, what was being excluded by the non obstante clause in s 46(1) — '... notwithstanding anything contrary in this Act or any other written law …' — *were only* such specific provisions in the EPF Act itself or in other legislation that were not in accord with this statutory objective or scope underlying s 46(1) namely to impose liability, inter alia, on directors of company to pay for the arrears of employees' contributions owed by a company.

SECTION 65(1)

[32] Section 65(1) of the EPF Act was as follows:

> 65 Civil proceedings to recover contributions
>
> (1) Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

Counsel for the third defendant in his submissions emphasised that this was an enabling provision to provide for a right to civil recovery simultaneously with criminal prosecution and, more importantly, to overcome any contention that the cause of action to recover defaulted contributions was only vested in the employees concerned and not the plaintiff's board. In other words, it was

contended that the provision was intended to give locus standi to the board of the plaintiff to institute civil proceedings to recover dues — notwithstanding the provisions of any other written law (see *Lembaga Kumpulan Wang Simpanan Pekerja v Shaharudin Omar & Ors* [2008] 8 CLJ 684).

[33] Accordingly, any provision in any other legislation that had the effect of denying the right of the plaintiff's board to bring civil proceedings independently in its name to recover arrears of contributions (including dividends and interest due on any contribution — s 65(3)) *as a civil debt* was what was intended to be excluded and s 65(1) would prevail in such event of conflict between this section and such provisions of the other written law.

[34] Counsel for the plaintiff however pointed out that the non obstante clause in s 65(1) 'Notwithstanding the provision of any other written law...'— was not in the original legislation but was only later introduced as an amendment (Act A914) to the EPF Act (effective from 1 August 1995). It was her argument that the provision as it existed before the amendment was sufficient enough to provide the board of the plaintiff with the locus standi to pursue a civil debt and accordingly the amendments were in particular intended to oust the LAct since the plaintiff was under the scheme of the EPF Act, the 'trustee of the Fund' (s 25 of the EPF Act) and monies to be recovered as a civil debt were for the benefit of employees, the beneficiaries of the fund.

I could not however see any nexus between those facts as they may be and how they expressly or impliedly could have displaced as claimed the statutory limitation period laid out in the LAct.

Could that have been the legislative intent behind the amendment to s 65(1) of the EPF Act which introduced the non obstante terms to that section? Surely if that was the intention of the legislature behind the amendments, as argued, then it ought to have been laid down in more precise and express terms as we have in *s 11P(d) of the National Service Act 1952*:

> *Nothing in any other written law which prescribes for a period of limitation* respecting the time for the hearing and determining of offences *shall apply* in the case of any proceedings so instituted as aforesaid.

Although in this National Service Act 1952 it referred to exclusion of limitation period in regard to criminal proceedings to be instituted, I do not see any reason why the same principles of statutory interpretation and exactitude should not have been adopted if that was the intent behind the use of the non obstante clauses not just in s 65(1) but in both s 45(1) and s 65(1) of the EPF Act.

[35] Similarly, as in the case of s 45(1) of the EPF Act, the court therefore in interpreting what was the extent of exclusion allowed by the non obstante

terms in s 65(1) notwithstanding the provisions of any other written law'— had firstly to determine the statutory objective or purpose behind that section. In this respect, I agree with the submissions of counsel for the third defendant that the statutory intent of s 65(1) was to enable the board to have the locus standi to bring proceedings to recover unremitted contributions as a civil debt apart from the criminal proceedings envisaged in the EPF Act. What could therefore be effectively overridden or excluded by the use of the non obstante clause was only provisions in any other written law that conflicted or clashed with this statutory objective or scope of s 65(1) of the EPF Act.

[36] The question then before the court was whether there was any conflict or clash between the statutory objective or purpose behind s 45(1) and s 65(1) of the EPF Act (or either of them) with the terms of the LAct, in particular the provisions therein setting the statutory deadlines for bringing actions in contract or tort, generally within six years of the cause of action arising. I could not find any such conflict or clash *between* such objective *and* the subject of time-bar or limitation found in the LAct. The statutory intent or scope of ss 45 and 65 of the EPF, as discussed above, were not at all or remotely even connected to the issue of limitation.

The non obstante clauses in those sections, that is, s 45(1) and s 65(1) of the EPF Act, were in wide and general terms and for the reasons discussed above did not in my assessment override or exclude the LAct as a whole or any specific limitation provision of that legislation.

[37] For completeness I should also state that I also found merit in the submission of counsel for the third defendant that s 3 of the LAct required another period of limitation to be prescribed in whatever legislation that intended to displace or vary the statutory limitation period laid out in the LAct. Section 3 of the LAct reads:

> This Act does not apply to any action or arbitration *for which a period of limitation is prescribed by any other written law or to any action* or arbitration …

As noted above no such alternative period of limitation was provided for in any event in the EPF Act.

[38] Obviously, there are good policy reasons why an alternative limitation period should be prescribed in any legislation whose intention was to displace the provisions of the LAct, that is, either reducing or extending the time-bar for civil proceedings to be brought against a subject. For otherwise it would have meant that one is left open for his entire lifetime exposed to likely suits or proceedings in certain situations. The law only assist those who proceed without delay to enforce whatever rights and remedies they have and generally (subject to some exceptions) the period of six years from the time a cause of action arising has been fixed by statute to be a fair period obviously giving

consideration to the burden on a likely defendant to preserve documents and secure relevant witnesses to resist any such potential action against him in the future.

[39] I therefore hold that the plaintiff had not been excluded or exempted from any of the provisions of the LAct by virtue of s 45(1) and/or s 65(1) of the EPF Act, as those provisions are presently worded and found in the statute book. The role of the court is to interpret and apply the law and not to create new law.

'LIMITATION' NOT PLEADED AS A DEFENCE.

[40] Counsel for the plaintiff referred to s 4 of the LAct and submitted that the defendants should in any event be precluded from relying on the issue of 'limitation' to strike out the summons and statement of claim as the defence of 'limitation' was not in the first place specifically pleaded in the statement of defence filed by the defendants in the action. Section 4 reads:

> 4 Limitation not to operate as a bar unless specially pleaded.
>
> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[41] The rationale for the requirement that the defence of limitation must be expressly pleaded has been drilled into us from our 'procedure and pleadings' classes in law school. Whether limitation has set in or not is a question of fact (as opposed to law) and therefore it had to be specifically pleaded for the opposing party not to be taken by surprise by that issue in the conduct of their case.

[42] Counsel for the defendants on the other hand contended that this was not an absolute rule or one cast in stone. He relied on the Federal Court judgments in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, and *Haji Hussain bin Haji Ali & Ors v Datuk Haji Mohamed Yaacob & Ors and connected cases* [1983] 2 MLJ 227; [1983] CLJ (Rep) 165 as support for the proposition that so long as the plaintiff knew that the defendants were going to raise the issue of 'limitation', there was no requirement that it should be expressly set in a statement of defence.

Counsel for the third defendant also drew attention to the fact that the plaintiff had not raised any such objection at the sessions court stage when the defendants' oral application to strike out was considered and the plaintiff had

only now in reply to defendants' submissions against the appeal chosen to raise this issue pertaining to the absence of a specific defence of 'limitation' in the statement of defence.

[43] The two Federal Court decisions cited by the third defendant's counsel, no doubt were cases where no statements of defence had been filed and they were in the context of proceedings to strike out the actions under O 18 r 19 of the Rules of the High Court 1980 before any defence was filed.

Would it then be any different that in this instant case a statement of defence had been filed but at an early stage of the proceedings itself (in the context of plaintiff's applications for amendment including to the statement of claim), the defendants had already given notice through their *afidavit balasan* that their defence would be that the action was not sustainable as it was statute-barred? I should not think so.

[44] The plaintiff had sufficient notice of this defence to be mounted by the defendants to the action.

The same principles that can be extracted from the Federal Court decisions can be applied in the situation obtaining in this case, particularly if one is mindful that should the plaintiff had been successful in amending their statement of claim, the defendants would have had a corresponding right to amend their statement of defence. Nothing would have restricted the defendants from then amending their pleadings to include a specific defence that the action was statute-barred. In short the so called defect in the pleading could and would have been cured in any case if the matter proceeded further.

[45] Such an objection should have been taken by the plaintiff in any case earlier in the proceedings and not just at this stage if the plaintiff was indeed serious about the same. It however appears to me that the plaintiff and the learned sessions judge acted or proceeded to deal with the defendants' oral application to strike out the action (notwithstanding no express defence of limitation being pleaded), fully conscious of and recognising the defendants' right always to amend their statement of defence to include the defence of 'limitation' if it came to that.

[46] I am therefore constrained to reject the plaintiff's contention that the failure by the defendants to plead the defence of 'limitation' in the statement of defence was fatal to the defendants' case that the action was statute-barred and consequently the defendants were also precluded from advancing their contention on the effect of non obstante clauses as found in s 45(1) and s 65(1) in the EPF Act in this appeal.

CONCLUSION

[47] I am not therefore persuaded that the learned sessions judge had erred in

law when he struck out the plaintiff's summons and statement of claim. Accordingly the plaintiff's appeal is dismissed.

[48] The decision of the sessions court of 12 May 2010 is affirmed.

[49] There will be no order as to cost.

Appeal dismissed with no order as to costs.

Reported by Kanesh Sundrum